

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BITMANAGEMENT SOFTWARE GMBH,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

REDACTED VERSION

No. 16-840 C

Senior Judge Edward J. Damich

**DEFENDANT'S MOTION FOR LEAVE TO FILE
A RESPONSE TO PLAINTIFF'S SUR-REPLY REGARDING
OBJECTIONS TO EVIDENCE OFFERED IN SUPPORT OF
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY**

Defendant, the United States (the Government) respectfully moves leave to file the attached four-page response to the admissibility arguments of Plaintiff, Bitmanagement Software GmbH (Bitmanagement), as stated in its Sur-Reply. See ECF 34.

ARGUMENT

The Government's motion for leave to file a response to Bitmanagement's sur-reply should be granted because Bitmanagement relies, for the first time in its Sur-Reply, on a newly-submitted declaration of its CEO. See ECF 34-1 (declaration); ECF 34 at 3-5 (citing). Bitmanagement failed to offer this declaration with its Motion for Partial Summary Judgment, see ECF 25, with its Reply in Support of its Motion, see ECF 29, or with its Response to the Government's evidence objections, see ECF 29-1. In fairness, the Government should be provided an opportunity to respond to this new declaration, particularly where Bitmanagement was obligated to provide support for its motion for summary judgment in the first instance. See RCFC 56(c)(1); see also United States v. Ford Motor Co., 463 F.3d 1267, 1277 (Fed. Cir. 2006) (“It is unfair to consider an argument to which the [opposing party] has been given no

opportunity to respond.”); Novosteel SA v. United States, 284 F.3d 1261, 1274 (Fed. Cir. 2002) (“[R]eply briefs *reply* to arguments made in the response brief—they do not provide the moving party with a new opportunity to present yet another issue for the court’s consideration.”) (emphasis in original); Amoco Oil Co. v. United States, 234 F.3d 1374, 1377 (Fed. Cir. 2000).

In view of the foregoing, the Government respectfully moves for leave to file the attached four-page response to afford it the opportunity to address Bitmanagement’s arguments with respect to the newly-raised declaration.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

GARY L. HAUSKEN
Director

s/Scott Bolden
SCOTT BOLDEN
Deputy Director
Commercial Litigation Branch
Civil Division
Department of Justice
Washington, DC 20530
Email: Scott.Bolden@USDOJ.gov
Telephone: (202) 307-0262
Facsimile: (202) 307-0345

Of Counsel:
RICHARD J. HUBER
Department of the Navy

August 2, 2018